

STATE OF MICHIGAN
COURT OF APPEALS

DANNY CALDWELL and KELLY CALDWELL,

Plaintiffs-Appellants/Cross-
Appellees,

v

DELTA LAND SURVEYING &
ENGINEERING, INC.,

Defendant-Appellee/Cross-
Appellant,

and

PARKWOOD DEVELOPMENT, INC., TED D.
GOUPIL, and PATRICIA A. GOUPIL,

Defendants/Third-Party Plaintiffs-
Appellees/Cross-Appellants,

and

DAVID G. BILICKI, INC., DAVID G. BILICKI,
and EVELYN M. BILICKI,

Third-Party Defendants-Appellees.

Before: Jansen, P.J., and Markey and Gage, JJ.

PER CURIAM.

The instant case primarily involves claims of professional negligence concerning a condominium unit purchased by plaintiffs. Plaintiffs appeal as of right, challenging the trial court's orders granting summary disposition in favor of defendants, Delta Land Surveying & Engineering, Inc. (Delta Land Surveying), Parkwood Development, Inc. (Parkwood Development), and Ted Goupil. Plaintiffs also challenge the trial court's dismissal of the third-party defendants without prejudice. Defendants, Delta Land Surveying, Parkwood Development, and Ted Goupil, cross-appeal, challenging the trial court's denial of attorney fees and costs. We

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affirm the orders granting summary disposition, but remand for further proceedings regarding attorney fees and costs.

I. Facts and Proceedings

In 1995, plaintiffs purchased a condominium unit at the Clover Knoll Condominium complex in Fenton, Michigan. The sales agreement contained the following inspection clause:

Purchaser shall have the option for 10 days from the date of acceptance of this agreement to have the property inspected, at purchaser's expense. Within the same 10 days, the purchaser shall notify the sellers and broker in writing with a copy of the inspection report specifying any defective conditions. If no notice is received or no inspection is held within the time allotted, the right to an inspection shall be deemed waived and the purchaser shall accept the property "as is."

At the time of the sale, Parkwood Development was the assignee of a land contract interest in the property that Ted Goupil and his wife, Patricia Goupil, had acquired from David G. Bilicki, Inc. Parkwood Development was also involved in the actual construction of the condominium unit on the property. Parkwood Development acquired its deed to the property from the Goupils on December 27, 1995, which was the same day that Ted Goupil, as president for Parkwood Development, executed a deed conveying the property to plaintiffs to complete the sale.

In May 2001, plaintiffs filed the instant action against Parkwood Development, the Goupils, and Delta Land Surveying, alleging that the condominium unit had sustained damage and lost economic value because of flooding when it rained, which in turn was allegedly due to inadequate drainage on the property. Plaintiffs' complaint alleged that Parkwood Development, in the capacity of a professional developer, and Delta Land Surveying, as the alleged designer of site and drainage plans for the condominium complex, were liable for professional negligence and that the sales agreement should be rescinded based on a mutual mistake regarding the condition of the property. Parkwood Development and the Goupils filed a third-party complaint against David G. Bilicki, Inc., David Bilicki, and Evelyn Bilicki, in their capacities as alleged owners, designers, developers, or sellers of the condominium complex.

The trial court subsequently granted plaintiffs' motion to amend their complaint to remove the rescission count and add a claim against Ted Goupil based on the same theory of professional negligence alleged against Parkwood Development. Plaintiffs also sought to pierce Parkwood Development's corporate veil in order to hold Ted Goupil personally liable for any damages caused by Parkwood Development's professional negligence. But the trial court specified in its August 14, 2001, order allowing the amended complaint that, "Defendant/Third Party Plaintiff's Attorney may file a Motion for Summary Disposition against Plaintiffs' Amended Complaint as to Defendant/Third Party Plaintiff Ted D. Goupil, and if successful, may recover his costs and reasonable attorney fees."

In January 2002, the trial court granted summary disposition in favor of both Parkwood Development and Ted Goupil, but denied costs. The court also granted summary disposition in favor of Delta Land Surveying with regard to plaintiffs' claims relating to surveying work, but denied the motion with regard to plaintiffs' claims relating to engineering design work, without

prejudice to Delta Land Surveying filing another motion after the completion of discovery. Following further discovery and two motions for summary disposition brought by Delta Land Surveying, the trial court granted summary disposition in favor of Delta Land Surveying, without awarding costs or attorney fees. This appeal followed.

II. Summary disposition for Parkwood Development and Ted Goupil

Plaintiffs first argue that the trial court incorrectly cited the three-year statute of limitations in MCL 600.5805, governing claims of ordinary negligence, rather than the six-year statute of limitations in MCL 600.5839, governing actions against architects, engineers and contractors arising out of improvements to real estate, when granting summary disposition in favor of Parkwood Development and Ted Goupil.

Examining the trial court's ruling as a whole, it is apparent that plaintiffs have misconstrued the court's ruling. Although the trial court alluded that plaintiffs' professional negligence claim was barred by the statute of limitations, the actual substance of the trial court's ruling was that plaintiffs could not rely on MCL 600.5839, because there was "no foundation for professional negligence." The court found no basis for plaintiffs' professional negligence claim because the relationship between plaintiffs and Parkwood Development was only that of seller and purchaser.

A statute of limitations is generally treated as procedural in nature, rather than substantive, unless the statute also creates a new cause of action. *Lothian v Detroit*, 414 Mich 160, 165-166; 324 NW2d 9 (1982). MCL 600.5839 has been construed as operating as both a statute of limitations (by prescribing the time limits for certain actions) and a statute of repose (by setting a fixed time for liability). See generally *Frankenmuth Ins Co v Marlette Homes*, 456 Mich 511, 513; 573 NW2d 611 (1998), and *O'Brien v Hazlet & Erdal*, 410 Mich 1, 15-16; 299 NW2d 336 (1980).¹ It protects engineers, architects, and contractors from stale claims, while also eliminating open-ended liability for defects in workmanship. *Pitsch v ESE Michigan, Inc.*, 233 Mich App 578, 602; 593 NW2d 565 (1999); *Abbott v John E Green Co*, 233 Mich App 194, 200; 592 NW2d 96 (1998). MCL 600.5839 provides:

(1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such

¹ A statute of limitations begins to run when all elements of an action, including damages, are present. See *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 151; 200 NW2d 70 (1972) (discussing tortious injury to persons); *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 478; 586 NW2d 760 (1998) (discussing tortious injuries under the three-year statute of limitations in MCL 600.5805(8) [MCL 600.5805(10), effective March 31, 2003, pursuant to 2002 PA 715]). Unlike a statute of limitations, a statute of repose may bar a claim before an injury or damage. *Frankenmuth Ins Co*, *supra* at 513 n 3. When the statutory period elapses, no cause of action can arise. *O'Brien*, *supra* at 15-16.

injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement,, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

* * *

(4) Contractor; definition. As used in this section, "contractor" means an individual, corporation, partnership, or other business entity which makes an improvement to real property.

Because MCL 600.5939 does not create a cause of action, its relevancy here is limited to whether Parkwood Development or Ted Goupil properly may be considered a “contractor” in order to allow plaintiffs to take advantage of the time limits prescribed in MCL 600.5939.² Ordinary negligence principles apply in determining whether plaintiffs had an actionable claim against Parkwood Development or Ted Goupil as a contractor, that is, an entity or person who makes an improvement to real property.

“Actionable negligence presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty by the other, and such duty must be imposed by law.” *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). In determining if the parties’ relationship is sufficient to establish a duty, the proper inquiry is whether the defendant had any obligation for the benefit of the particular plaintiff. *Maiden v Rozwood*, 461 Mich 109, 132; 597 NW2d 817 (1999). Whether a duty exists is a question of law for the court. *Id.* at 131.

The substantive issue before us, therefore, does not involve a choice regarding which statute of limitations to apply, but rather the duty element of plaintiffs’ alleged cause of action for professional negligence against Parkwood Development and Ted Goupil. Examined in this context, plaintiffs have not established any basis for disturbing the trial court’s decision granting summary disposition in favor of Parkwood Development and Ted Goupil.

We review the trial court’s decision to grant summary disposition de novo. *Maiden, supra* at 118. Because the trial court considered proofs outside the pleadings, we review the motion under MCR 2.116(C)(10). *Velmer v Baraga Area Schools*, 430 Mich 385, 389; 424

² Because MCL 600.5939 has its own definition of “contractor” we find it unnecessary to address plaintiffs’ position that “contractor” and “developer” are synonymous terms. When a statute is clear and unambiguous, judicial construction is not permitted. *Frankenmuth Ins Co, supra* at 515.

NW2d 770 (1988). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden, supra* at 120. The admissible evidence submitted by the parties must be considered in a light most favorable to the nonmovant. If proffered admissible evidence does not establish a genuine issue of material fact, the movant is entitled to judgment as a matter of law. *Id.* at 120-121.

Here, the only relationship alleged in plaintiffs' amended complaint as a basis for establishing a duty owed by Parkwood Development involves plaintiffs' status as purchasers. Plaintiffs' complaint alleges:

As a professional developer, Parkwood Development Inc. owed a duty to the Plaintiff purchasers of the condominium designed and built by said Defendants, to exercise a degree of skill and care ordinarily exercised by others in this profession in designing condominium sites, and overseeing the design and construction and work of its independent contractors and employees.

The evidence submitted to the trial court, for purposes of Parkwood Development's and Ted Goupil's motion for summary disposition, similarly establishes that any alleged duty claimed by plaintiffs is based solely on their status as purchasers. Indeed, we note that plaintiffs' attorney conceded this point at the hearing on the motion, and, in particular, agreed that plaintiffs had no contract with Parkwood Development to build the condominium unit, but only a contract for purchase.

A contract can create the relationship out of which a common-law duty of care arises, "the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done." *Clark, supra* at 261. But in this case, the facts were undisputed that plaintiffs' contractual relationship with Parkwood Development did not involve an agreement for contractor services. Hence, the sales agreement executed by plaintiffs in 1995 did not create the type of professional relationship on which plaintiffs could impose a duty on Parkwood Development for their benefit.

Further, we hold that plaintiffs have failed to establish any basis outside the sales agreement on which to impose contractor duties on Parkwood Development. Plaintiffs' reliance on *Hilla v Gross*, 43 Mich App 648; 204 NW2d 712 (1973), is misplaced because in *Hilla* this Court did not reach any issue regarding the builder's duty in constructing the deck, but rather focused on the element of causation. Further, unlike in *Hilla*, the instant case does not involve a risk of physical injury to a person, but rather property damage and economic losses that plaintiffs could have protected against when negotiating their sales agreement with Parkwood Development. Indeed, the "as is" clause in the sales agreement was a means for allocating the risk of losses between the contracting parties. See *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994).

Absent the sales agreement, plaintiffs had no relationship with Parkwood Development and suffered no injury. Hence, giving due consideration to factors relevant to whether the law should impose a duty, we conclude that plaintiffs failed to establish factual support for imposing any obligation on Parkwood Development, as a contractor. *Buczkowski v McKay*, 441 Mich 96, 101-102; 490 NW2d 330 (1992). Summary disposition in favor of Parkwood Development was proper under MCR 2.116(C)(10).

We decline to consider plaintiffs' professional negligence claim against Ted Goupil, individually, because plaintiffs give only cursory treatment to this issue in their brief. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Further, to the extent plaintiffs sought to pierce the corporate veil to hold Ted Goupil personally liable for Parkwood Development's alleged professional negligence, we agree with the trial court that it is unnecessary to address this issue. Our determination that plaintiffs had no actionable claim against Parkwood Development renders this issue moot.³

II. Dismissal of Third-Party Defendants

We decline to address plaintiffs' challenge to the trial court's dismissal of the third-party defendants, David G. Bilicki, Inc., David Bilicki and Evelyn Bilicki. Plaintiffs did not assert any claims against these parties and have not established their standing to raise this issue on appeal. *Dep't of Consumer & Industry Services v Shah*, 236 Mich App 381, 385; 600 NW2d 406 (1999). In any event, plaintiffs' claim is moot in light of our decision affirming the trial court's grant of summary disposition in favor of Parkwood Development and Ted Goupil.

III. Summary disposition for Delta Land Surveying

Plaintiffs next challenge the trial court's grant of summary disposition in favor of Delta Land Surveying with regard to the engineering aspect of plaintiffs' cause of action. As with plaintiffs' argument concerning Parkwood Development and Ted Goupil, we note that the trial court resolved this issue on the basis of the merits of plaintiffs' cause of action, rather than the statute of limitations, MCL 600.5839. Hence, we apply ordinary negligence principles in reviewing the trial court's decision. Because the trial court considered proofs outside the pleadings, we again review the motion under MCR 2.116(C)(10). *Velmer, supra*. Under that standard, we conclude that the trial court correctly granted summary disposition in favor of Delta Land Surveying on both grounds challenged by plaintiffs on appeal.

First, we find no error in the trial court's determination that summary disposition was warranted with regard to whether Delta Land Surveying controlled the engineering aspect of the site plan. Plaintiffs' speculation that some of the engineering design work reflected on the site plan might have been the product of engineering design work performed by Delta Land Surveying does not rise to a level of creating a genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 457; 597 NW2d 28 (1999). Further, plaintiffs did not establish a genuine issue of fact regarding whether Delta Land Surveying could be held vicariously liable for Richard Kraft's engineering design work, as a borrowed servant from Richard H. Kraft Engineering, Inc., under the control test applied in a tort action. *Hoffman v JDM Associates*, 213 Mich App 466, 468-469; 540 NW2d 689 (1995). Viewed in a light most favorable to plaintiffs, the proofs submitted to the trial court did not permit a reasonable inference that Delta Land Surveying had the right to control the detailed activities that Richard Kraft performed to arrive at his engineering design incorporated into the site plan for the condominium complex. *Id.*

³ Given our decision to affirm the trial court's ruling, it is also unnecessary to consider the alternative grounds for affirmance urged by Parkwood Development and Ted Goupil.

We also reject plaintiffs' claim that the trial court erred in finding no genuine issue of material fact with regard to whether the engineering design work reflected on the site plan was a proximate cause of their damages. In light of plaintiffs' counsel's concession at the May 20, 2002, hearing, that plaintiffs were suing for damages to the "house," and not flooding to the yard, we decline to consider plaintiffs' cursory argument regarding flooding to the yard itself. "Counsel may not harbor error as an appellate parachute." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Indeed, we need not even address plaintiffs' challenge to the trial court's ruling regarding the issue of proximate causation because plaintiffs do not cite any relevant legal authority in support of their argument. *Eldred, supra* at 150. Plaintiffs' reliance on *Christy v Prestige Builders, Inc*, 94 Mich App 784; 290 NW2d 395 (1980), is misplaced because, in that case, this Court addressed the element of duty, not causation, when finding a question of fact. Further, the Supreme Court subsequently reversed this Court's decision in *Christy* in an opinion in which Justice Levin wrote:

The Court of Appeals apparently held that Glass had a "general duty 'to conform to the legal standard of reasonable conduct in the light of the apparent risk' ", citing *Moning [v Alfonso]*, 400 Mich 425; 254 NW2d 759 (1977)]. However, in so doing, the Court made the error *Moning* warned against; confusing the existence of a duty with the standard of conduct applied *if* a duty exists. The quoted phrase from *Moning* does not create a duty, but defines the scope of the obligation created by an existing duty. [*Christy v Prestige Builders, Inc*, 415 Mich 684, 696-697; 329 NW2d 748 (1982) (emphasis in original).]

In any event, we will assume for purposes of our review that Delta Land Surveying, either itself or vicariously through Kraft, owed a duty to plaintiffs relative to the engineering aspect of the site plan and that this duty was breached. The pertinent question, thus, is whether any alleged breach of that duty proximately caused plaintiffs' alleged damages. *Pitsch, supra* at 597. Proximate causation in a negligence action actually requires proof of two elements, cause in fact and legal or "proximate" causation. *Skinner v Square D Co*, 445 Mich 153, 162-164; 516 NW2d 475 (1994).

Here, plaintiffs failed to establish a genuine issue of material fact regarding causation in fact. The cause in fact element generally requires proof that, but for the defendant's action, the plaintiff's injury would not have occurred. *Id.* at 163. Neither the conclusory averment in the affidavit of plaintiffs' proposed expert that the site drainage and storm water runoff design in the site plan contributed directly to plaintiffs' damages, nor his speculation regarding how water would have flowed had the proposed elevation grades on the site plan been followed, are sufficient to establish a genuine issue of material fact. Although an expert may give an opinion that embraces an ultimate issue of fact, a proper foundation must be laid for opinion evidence. See MRE 704; *Maiden, supra* at 130; *Downie v Kent Products, Inc*, 420 Mich 197, 205; 362 NW2d 605 (1984).

Moreover, the overriding problem demonstrated by the proofs in this case was that the elevations incorporated into the site plan for drainage were not adopted. Once action was taken to deviate from the site plan, one could hypothesize any number of deviations that could have been made with positive or negative results for plaintiffs' condominium unit. Causal proof may

not be based on mere conjecture. *Skinner, supra* at 164. Viewed in a light most favorable to plaintiffs, the proofs were insufficient to support a reasonable inference that it was more likely than not that Delta Land Surveying's alleged breach of duty was a cause in fact of plaintiffs' damages. *Id.* at 165. Hence, while the issue of causation is normally one for a trier of fact, summary disposition was proper here because plaintiffs did not establish a genuine issue of factual causation. *Reeves v Kmart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998).

Because we have found no error with regard to both grounds found by the trial court for granting summary disposition in favor of Delta Land Surveying, we find it unnecessary to address the alternative ground for affirmance argued by Delta Land Surveying based on the duty element of plaintiffs' action for professional negligence. In passing, however, we note that plaintiffs' reliance on *Funk v General Motor Corp*, 392 Mich 91, 101; 220 NW2d 641 (1974), as support for finding a nondelegable duty of care owed to them by Delta Land Surveying is misplaced because the instant case involves neither a landowner's liability nor the safety of work conditions at a construction site. We further note that the case before us does not involve any claim that plaintiffs were intended beneficiaries of Delta Land Surveying's contract for its work at the condominium complex. A person is only a third-party beneficiary of a contract if that promisor undertook an obligation directly to or for the person. MCL 600.1405; *Brunsell v Zeeland*, 467 Mich 293; 651 NW2d 388 (2002). In a case such as this, where a tort duty is sought to be imposed on a professional for information produced by the professional, we agree with Delta Land Surveying that reliance by the person claiming injury is a relevant factor in assessing whether the law will impose a duty. See *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 468-469; 487 NW2d 807 (1992), and *Waldor Pump & Equipment Co v Orr-Schelen-Mayeron & Associates, Inc*, 386 NW2d 375 (Minn App, 1986) (professional engineer liable in negligence to those who foreseeably rely on the professional services). Here, plaintiffs did not allege in their amended complaint, or provide evidence, that they actually relied on the engineering design work in the site plan.

IV. Costs and Sanctions

Delta Land Surveying argues on cross-appeal that the trial court violated MCR 2.625(A)(1) by summarily denying costs without stating its reasons in writing. Delta Land Surveying also argues that it should have been awarded costs and attorney fees pursuant to MCR 2.114(D)(2) or MCL 600.2591(3)(a)(ii) and (iii). We conclude that Delta Land Surveying did not properly preserve this issue because its general request for costs and attorney fees in its motion for summary disposition did not identify the legal authority for its request.

However, we may overlook the preservation requirement to the extent that Delta Land Surveying has presented a question of law for which all necessary facts to resolve the question have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). As such, presuming that the trial court was aware of the law, see *People v Farmer*, 30 Mich App 707; 186 NW2d 779 (1971) (a trial judge is presumed to know the law absent proof to the contrary), it committed an error of law by denying taxable costs to Delta Land Surveying, as the prevailing party, without stating any reasons for its decision. MCR 2.625(A)(1) and (F)(1); see also *In re Attorney Fees & Costs*, 233 Mich App 694, 699; 593 NW2d 589 (1999) (prevailing party in action determined when the trial court granted the defendants' motion for summary disposition and dismissed the plaintiffs' action); *Village Green of Lansing v Board of Water & Light*, 145 Mich App 379; 377 NW2d 401 (1985).

But attorney fees generally are not taxable as costs unless authorized by statute or court rule. *Broadway Coney Island, Inc v Commercial Union Ins Cos (Amended Opinion)*, 217 Mich App 109, 116; 550 NW2d 838 (1996). Here, without an explanation as to why the trial court denied attorney fees, we are left to speculate as to the legal and factual basis of any decision.

Under these circumstances, we conclude that this case should be remanded to the trial court to allow it to state its reason for denying costs and attorney fees. Further, because the record does not reflect any timeliness issues that would preclude Delta Land Surveying from pursuing costs and attorney fees as sanctions under MCR 2.114(D) or MCL 600.2591, the trial court should afford Delta Land Surveying an opportunity on remand to file a proper motion, specifying the factual and legal basis of the motion. Cf. *Check Reporting Services, Inc v Michigan Nat'l Bank-Lansing*, 191 Mich App 614, 629; 478 NW2d 893 (1991); see also *In re Attorney Fees & Costs*, *supra* at 699, and *Maryland Cas Co v Allen*, 221 Mich App 26, 30-31; 561 NW2d 103 (1997). The trial court shall make specific findings of fact regarding the motion.

We similarly decline to address Parkwood Development's and Ted Goupil's claim that the trial court clearly erred in refusing to award sanctions pursuant to MCR 2.114. Like Delta Land Surveying, the record does not reflect that Parkwood Development and Ted Goupil specified the legal basis for their request for costs and attorney fees in their motion for summary disposition. Further, while the trial court expressed a willingness to grant costs and attorney fees for at least Ted Goupil when granting plaintiffs' motion to amend the complaint, the trial court gave no explanation for its subsequent denial of costs and attorney fees when ruling on the motion for summary disposition. We therefore remand to allow the trial court to explain its decision, but Parkwood Development and Ted Goupil shall likewise be afforded an opportunity to move for sanctions in the same manner as Delta Land Surveying.

Affirmed with respect to the grant of summary disposition, but remanded for further proceedings not inconsistent with this opinion regarding the issue of costs and attorney fees. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage